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No. 82-2116

In The

Supreme Court of the United States

October Term, 1982

DALGETY FOODS, INC.,

Appellant,

vs.

ANGELINA AVINA,

Appellee.

APPELLEE'S MOTION TO DISMISS OR AFFIRM

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CALIFORNIA LABOR CODE, SECTION 132a

It is the declared policy of this state that there should not be discrimination against workers who are injured in the course and scope of their employment.

(1) Any employer who discharges, or threatens to discharge, or in any manner discriminates against any employee because the latter has filed or made known his intention to file an application with the appeals board, or because the employee has received a rating, award or settlement, is guilty of a misdemeanor and subject to the provisions of Section 4553. Any such employee shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by such acts of the employer.

(2) Any insurance carrier who advises, directs or threatens an insured under penalty of cancellation or a raise in premium or for any other reason, to discharge an employee because the latter has filed or made known his intention to file an application with the appeals board, or because the employee has received a rating, award, or settlement, is guilty of a misdemeanor and subject to the provisions of Section 4553.

(3) Any employer who discharges, or threatens to discharge, or in any manner discriminates against any employee because the employee testified or made known his intention to testify in another employee's case before the appeals board is guilty of a misdemeanor, and the employee shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by such acts of the employer.

(4) Any insurance carrier who advises, directs or threatens an insured under penalty of cancellation or a raise in premium or for any other reason, to discharge or in any manner discriminate against an employee because the employee testified or made known his intention to testify in another employee's case before the appeals board is guilty of a misdemeanor.

Proceedings under this section for increased compensation as provided in Section 4553, or for reinstatement and reimbursement for lost wages and work benefits, are to be instituted by filing an appropriate petition with the appeals board, but such proceedings may not be commenced more than one year from the discriminatory act or date of termination of the employee. The appeals board is vested with full power, authority, and jurisdiction to try and determine finally all the matters specified in this section subject only to judicial review, except that the appeals board shall have no jurisdiction to try and determine a misdemeanor charge. The appeals board may refer and any worker may complain of suspected violations of criminal misdemeanor provisions of this section to the Division of Labor Standards Enforcement, or directly to the office of the public prosecutor.

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Appellee.

APPELLEE'S MOTION TO DISMISS OR AFFIRM

To The Honorable Justices of the United States Supreme Court:

Pursuant to this Court's Rule 16, Appellee Angelina Avina ("Mrs. Avina") hereby files this motion to dismiss the appeal filed by Appellant Dalgety Foods, Inc. ("Dalgety") on the grounds that it does not present a substantial federal question requiring plenary consideration and on the further grounds that the judgment of the California Court of Appeal rests on an adequate non-federal basis. In the alternative, Appellee asks this Court to affirm the judgment of the California Court of Appeal.

Appellant presents four questions to this Court on appeal and asks this Court to accept review of its fourth question (whether its right to due process was violated) as if it were presented in a petition for certiorari under 28 U. S. C. § 1257(3). Appellee asks this Court, therefore, to treat her motion to dismiss or affirm as if it were a brief in opposition to a petition for writ of certiorari as to this fourth question.

I.

SUMMARY OF FACTS AND CASE

Mrs. Avina was originally hired in 1968 by Spiegle Foods, Inc., the predecessor in interest to Dalgety. She continued to work seasonally at Dalgety as a conveyor belt worker and produce sorter until 1979. In 1976, she had a knee injury that led her to file a workers' compensation claim.

Her 1979 employment at Dalgety commenced on March 8. She was injured in a non-industrial fall on July 10, 1979 and was forced to stop working temporarily. While off work, on July 16, 1979, her workers' compensation action ended with a Compromise and Release payment from the Mission Insurance Company to Mrs. Avina of $22,628.80. On September 7, 1979, she presented to Dalgety a medical release, signed by her physician, which authorized her to return to her former work. Dalgety refused to rehire her and notified her in writing that her employment was terminated. Mrs. Avina then sought,

and eventually found, similar employment with another company.

Mrs. Avina's union at Dalgety initiated a grievance procedure in accord with the relevant Collective Bargaining Agreement to contest her discharge. An arbitration culminated that procedure. The arbitrator upheld Mrs. Avina's discharge on the grounds that it had been neither arbitrary nor capricious and therefore did not violate the Collective Bargaining Agreement.

Simultaneous to the grievance procedure, Mrs. Avina filed a claim with the California Workers' Compensation Appeals Board (hereinafter "WCAB") alleging facts indicating that her discharge was a response by Dalgety to her Workers' Compensation settlement and that it therefore was in violation of California Labor Code § 132a. The workers' compensation judge found in favor of Mrs. Avina. Dalgety petitioned for reconsideration to the WCAB. The WCAB interpreted the case of *Western Electric Company v. WCAB,* 99 Cal. App. 3d 629, 160 Cal. Rptr. 436 (1979) as holding that an employer's good faith belief, even if mistaken, that an employee's physical condition presented a danger to the work place was sufficient to remove the discharge of that employee from the reach of § 132a. Since the workers' compensation judge had accepted Dalgety's belief that Mrs. Avina was a danger to the work place as genuine, the WCAB upheld the discharge.

Mrs. Avina unsuccessfully petitioned the WCAB for reconsideration of that decision. She likewise unsuccessfully petitioned the California Court of Appeal for a Writ of Review. Upon further appeal, the California Supreme

Court granted a hearing to Mrs. Avina and ordered the Court of Appeal to entertain such a writ and to consider the *Western Electric Company* case. Dalgety then petitioned the California Supreme Court for a rehearing on the grounds that Dalgety had not been timely served with Mrs. Avina's Petition for Hearing. This petition was dismissed. The Court of Appeal then issued an opinion stating that Mrs. Avina had clearly demonstrated an ability to resume her work and remanding the case to the WCAB for further proceedings.

Dalgety petitioned the Court of Appeal for a rehearing on the grounds *inter alia* that the court had not addressed its federal preemption and collateral estoppel defenses. In rejecting that petition, the Court of Appeal modified its earlier opinion by stating that an arbitrator's decision that an employee's dismissal was consistent with a collective bargaining agreement does not bind either the WCAB or the Court of Appeal in a § 132a action. Dalgety then unsuccessfully petitioned to the California Supreme Court for a hearing on the same grounds.

In its Decision After Remittitur, the WCAB decided that further proceedings were unnecessary and reinstated the workers' compensation judge's original decision in favor of Mrs. Avina. Dalgety petitioned for reconsideration, again on the grounds of federal preemption and collateral estoppel. The WCAB denied that petition. The Court of Appeal dismissed Dalgety's subsequent Petition for Writ of Review, brought on the same grounds. The California Supreme Court likewise denied a hearing on those grounds. Dalgety here appeals the Court of Appeal's rejection of its collateral estoppel and federal pre-

emption contentions and requests consideration of the contention that its due process rights were violated when, as it alleges, it was not timely served with Mrs. Avina's original Petition for Hearing to the California Supreme Court.

Mrs. Avina hereby moves to dismiss or affirm for the reasons that follow.

II.

California Labor Code §132a Embodies An Important Public Policy In Protecting Industrially Injured Workers Against Discrimination.

A. This Court's reasoning in Alexander v. Gardner-Denver Company, 415 U. S. 36 (1974) and in Barrentine v. Arkansas-Best Freight Systems, Inc., 450 U. S. 728 (1981) is applicable to this case.

Dalgety contends that there was a dispositive factual finding in the arbitration of Mrs. Avina's discharge to which preclusive effect must be given under traditional collateral estoppel principles. Mrs. Avina submits, however, that the same careful reasoning which led this court to its decisions in *Alexander, supra,* and *Barrentine, supra,* when applied to the instant case, supports the California Court's denial of preclusive effect when it heard her Section 132a claim.

In *Alexander, supra,* the Gardner-Denver company discharged Mr. Alexander, a black employee. The collective bargaining agreement in effect included both a management right to discharge for "proper cause" and a prom-

ise of no discrimination against any employee on account of race. Alexander submitted his claims of unjust discharge and racial discrimination to final and binding arbitration and lost. He then filed an action in Federal District Court alleging his discharge resulted from a racially discriminatory employment practice in violation of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.* The Tenth Circuit Court of Appeals affirmed the District Court's grant of Gardner-Denver's summary judgment motion on the ground that Alexander's claim was precluded by the adverse arbitration. This court granted certiorari and reversed.

In *Barrentine, supra,* Mr. Barrentine presented a wage claim to a joint grievance committee for final and binding decision under a collective bargaining agreement. The claim was rejected and he filed suit in Federal District Court over the same wage claim alleging compensability under the Fair Labor Standards Act, 29 U. S. C. § 201, *et seq.* The Eighth Circuit Court of Appeals upheld the District Court's refusal to address the merits of the claim on the ground that it was barred by the adverse arbitration. This Court granted certiorari and reversed.

Dalgety suggests that this Court decided *Alexander* and *Barrentine* as it did only because conflicting federal labor policies were involved and that its decision would and should be otherwise when a *state* law conflicts with the national policy favoring arbitral finality.

Mrs. Avina submits that the crucial factor is not whether two federal policies or statutes are involved but whether a statute is involved, be it federal or state, which embodies minimum substantive guarantees for individual

workers and reflects an important public policy. What follows is an application of this Court's reasoning in *Alexander* and *Barrentine* to the alleged conflict between Section 132a of the California Labor Code and the policy of arbitral finality.

1. Legislative Intent.

The California Legislature declared in Section 132a: "It is the policy of this State that there should not be discrimination against workers who are injured in the course and scope of their employment." Such discrimination is a misdemeanor and subject to economic sanctions. Section 132a provides a minimum substantive guarantee against employment discrimination to workers who are industrially injured and assures them open access to administative and judicial forums. While seeking redress of a personal injury from discrimination, a worker also vindicates an important public policy. Its vindication in fact depends upon such litigation by individual workers. The statute on its face does not provide that a prior arbitral decision forecloses a worker's right to relief. To the contrary, it vests "full power, authority, and jurisdiction" in the appeals board to try and determine a worker's claim.

Section 132a is a law of general application and applies with equal force to employers who are parties to collective bargaining agreements and to those who are not. If the position urged by Dalgety is adopted, the same kind of conduct might result in a misdemeanor charge and economic penalty against an employer who is not party to a collective bargaining agreement and no sanction whatsoever against an employer who is. An employer with superior bargaining strength could effectively relieve him-

self by private contract of his public duty under Section 132a and its purpose would be nullified.

2. Separate Statutory and Contractual Rights.

Section 132a gives an individual employee statutory rights which are distinctly separate from his contractual rights. An arbitrator's decision is a final and binding resolution of contractual rights only. The employee's statutory rights are not waived prospectively by signing a labor contract or resorting to the arbitral forum even though the same factual occurrence may implicate both the contractual and statutory rights.

In *Judson Steel Corp. v. Workers' Compensation Appeals Board* (1978) 22 C. 3d 658, the California Supreme Court declared that the protection against discrimination afforded by Section 132a is not one susceptible of "loss" or "waiver" through collective bargaining:

> Moreover, it is clear in any event that an employer may not defend a discriminatory employment practice, prescribed by Section 132a, on the basis of the provision of a collective bargaining agreement, for a union may no more bargain away its members' statutory rights against discrimination under the workers' compensation law than it may bargain away its members' statutory rights against, for example, sexual or racial discrimination. As the Court held in *Robinson v. Lorillard Corp* (citation omitted): "The rights assured by Title VII are not rights which can be bargained away—either by a union, an employer or by both acting in concert".

Id. at 665, fn. 5.

3. Limitations of Arbitral Forum.

An arbitrator is confined to interpreting and applying the terms of a private contract. The mechanics of

arbitration are simple and technicalities avoided. Lawyers, transcripts and briefs are not the normal fare in arbitration. Formal rules of evidence and procedure do not apply. Unlike decisions of the Workers' Compensation Appeals Board which are subject to judicial review, the decision of an arbitrator is final and even an arbitrator's error of fact or law is not grounds for the court to vacate his award.

4. Illusory Threat to Arbitral Institution.

The threat to the continued vitality of the arbitral institution if a worker pursues both his contractual and statutory remedies is illusory. The *quid pro quo* for an arbitration clause is a no strike clause. In light of the benefits to the employer from such a pledge, it is improbable that the detriment of double vexation in defending a Section 132a claim would undermine his incentive to seek an arbitral solution to the broad range of disputes which arise from the labor-management relationship.

5. No Burden on Judicial System.

The California Legislature has established an expert administrative agency to enforce the workers' compensation laws including 132a, with judicial review available. No burden is imposed on the state or federal judiciary by denying preclusive effect to arbitration.

6. Overriding State Interest.

Any slight adverse impact on the arbitral institution or the national policy favoring arbitral finality is far outweighed by the overriding state interest in preventing discrimination against the industrially injured. Section 132a guarantees an individual worker the type of "fundamental

right" which the dissent in *Barrentine* agreed justified the co-existence of contractual and statutory remedies: the fundamental right of "a workplace free from *discrimination,* racial and otherwise". 450 U. S. 728, 749 (emphasis in original).

7. Tenth Circuit Agrees.

The Tenth Circuit Court of Appeals in *Peabody Galion v. Dollar,* 666 F.2d 1301 (1981) allowed workers to maintain an action in diversity based on an Oklahoma statute which prohibits the discharge of an employee for filing a workers' compensation claim even though some of the workers had arbitrated and lost their claims of wrongful discharge based on the labor contract. The court specifically rejected Dalgety's notion that the rationale of *Alexander* and *Barrentine* is viable only when two federal policies are involved:

> In the instant case it is true that the independent remedy arises under state law rather than federal. We hold, however, that that does not constitute a distinguishing factor.

Id. at 1321

8. Oregon Supreme Court Agrees.

The Oregon Supreme Court in *Vaughn v. Pacific Northwest Bell Telephone Company,* 611 P.2d 281 (1980) found this Court's decision in *Alexander* to be helpful by analogy in resolving a challenge to a state statute based on a "presumption of exclusivity" of arbitration. The court held that this "presumption" can be overcome by evidence of an independent statutory scheme such as Oregon's state statute making it an unlawful employment prac-

tice to discriminate against a worker who applies for compensation benefits. A worker has a personal cause of action under this statute which, the court concluded, manifests the legislature's intent to afford an alternative or supplemental remedy to that provided by a collective bargaining agreement and overrides the preexisting policy in favor of exclusivity of arbitration. In accord, *Ivery v. U. S.*, 686 F.2d 410 (1982), cert. denied, 51 U.S.L.W. 3684 (1983) (although a statutory policy might provide an exception to the general rule favoring finality of arbitration, the Federal Tort Claims Act is not a statute which provides minimum substantive guarantees nor does it create a new cause of action in an individual worker.)

9. Restatement Agrees.

Dalgety cites the Restatement (Second) of Judgments, Section 84 as authority for the proposition that collateral estoppel normally should apply to factual issues determined in procedurally fair arbitrations. In its comments to Section 84, however, the authors note many exceptions and qualifications to the general rules of claim and issue preclusion:

> A dispute may be governed by an arbitration agreement but also be subject to statutory provisions for alternative or supplementary procedures. The conclusive effect of an arbitration award is subordinate to such provisions. . . . A similar limitation may be implied from the arbitration agreement, particularly if the effect of treating such an award as issue preclusive may be to complicate future arbitrations of the same kind.

Comments f and g.

III.

The Doctrine Of Collateral Estoppel Is Inapplicable To This Case.

A. The Arbitrator's Decision Does Not Collaterally Estop the Judicial Consideration of Different Issues Relating To A § 132a Action.

Mrs. Avina further contends that the doctrine of collateral estoppel is inapplicable to her case. The gist of Dalgety's collateral estoppel argument is a contention that the arbitrator decided that Mrs. Avina was a danger to the work place and that the workers' compensation judge was bound by that decision. However, as detailed below, (1) the issue before the arbitrator was whether defendant had acted arbitrarily or capriciously and not whether Mrs. Avina was a danger to the work place; (2) any decision the arbitrator may have made on the "danger to the work place" issue was therefore dicta and not binding on the workers' compensation judge; and (3) the issue before the WCAB involved whether Dalgety's conduct had passed a standard beyond merely being non-arbitrary and non-capricious.

B. The Issue Before The Arbitrator Was Merely Whether Dalgety Acted Arbitrarily Or Capriciously In Discharging Mrs. Avina.

The first sentence of the arbitrator's "decision and award" reads as follows: "The question before the arbitrator is 'Was Angelina Avina discharged for cause within the meaning of the collective bargaining agreement?' ". Appellant's Appendix G at 156. In their Post-Hearing Brief, dated December 26, 1979, counsel for

Dalgety states that "the contract requirement of 'sufficient cause' for discharge would be satisfied by all but the most outrageously unjust discharges." Counsel for Dalgety also cited extersive authority for its argument that a discharge must be upheld absent evidence that it stemmed from "arbitrary, capricious, or discriminatory intent." Appellant's Appendix F at 140-142.

The language of the arbitrator's "decision and award" indicates his agreement that the "arbitrary or capricious" standard was appropriate in arbitration of a discharge not based on misconduct or malfeasance. The "decision and award" reads in its entirety as follows:

> It is the conclusion of the Arbitrator that the company did not violate the collective bargaining agreement, was not arbitrary or capricious in reaching its decision; therefore, the Arbitrator is compelled to deny the grievance and sustain the discharge.

Appellant's Appendix G at 164.

Mrs. Avina's union elected not to seek judicial review of the arbitrator's decision in favor of Dalgety. Thus, it is now undisputed that the arbitrator used an "arbitrary or capricious" standard as the measure of whether Dalgety violated the collective bargaining agreement in discharging Mrs. Avina.

C. Any Decision The Arbitrator May Have Made Regarding The "Danger To The Work Place" Issue Was Dicta And Not Binding In A Later § 132a Action.

In the pages preceding the "decision and award," the arbitrator discussed the prospectives of the union and Dalgety. Specifically, he indicated: (1) that Mrs.

Avina had suffered a series of injuries; (2) that her past injuries might cause her to be subject to future injuries if not careful; (3) that her back, wrist, and knee problems might not get better and might well get worse; (4) that the physical demands of the job presented difficulties for her; and (5) that years of manual labor might reduce her productive life. Appellant's Appendix G. Dalgety contends that these points amount to a finding by the arbitrator that Mrs. Avina was a danger to the work place. Without considering that contention on its merits, Mrs. Avina submits, as explained above, that the arbitrator's mission was merely to decide whether Dalgety's decision that Mrs. Avina constituted a danger to the work place was arbitrary or capricious. As the workers' compensation judge noted in his "Recommendation of Petition for Reconsideration:" "under the ruling of the arbitrator, the good faith of defendants at the time of the discharge was a defense." The arbitrator clearly decided that Dalgety genuinely believed Mrs. Avina to be a danger to the work place. As Dalgety successfully contended at arbitration, this good faith belief alone justified the discharge of Mrs. Avina under the collective bargaining agreement in that it demonstrated that Dalgety acted neither arbitrarily nor capriciously. Any opinion that the arbitrator may have expressed as to whether Dalgety's belief met a further and more demanding standard such as "objective correctness" was unnecessary to completion of his mission and therefore was dicta. The dicta contained in an arbitrator's decision, of course, is not protected by the doctrine of collateral estoppel in a subsequent civil litigation. Therefore, even should this court agree that the arbitrator found Mrs. Avina to be a danger to the work place, that finding was not binding

on the workers' compensation judge in a subsequent § 132a action.

D. The Issue Before The Workers' Compensation Judge Was Not Limited To Whether Dalgety Had Acted Arbitrarily Or Capriciously.

The ultimate issue before the workers' compensation judge, and subsequently the WCAB and the reviewing courts, was whether Dalgety's discharge of Mrs. Avina violated § 132a. Each tribunal elected to frame that issue in terms of a threshold issue. As discussed below, the respective tribunals differed in their framing of that threshold issue.

Mrs. Avina has consistently maintained that the threshold issue before the workers' compensation judge was simply whether or not Dalgety singled her out for investigation in a reaction to her workers' compensation settlement. In *Judson Steel Company v. WCAB,* 22 Cal. 3d 658, (1978), the California Supreme Court held that § 132a prohibits discrimination *in any manner* by an employer against an industrially injured employee on the basis of the employee's injury. In the present case, the workers' compensation judge's "minutes of hearing" recounts the testimony of a Dalgety executive in which he admits that he initiated the investigation of Mrs. Avina in reaction to the size of her workers' compensation award. Assuming that the relevant threshold inquiry is whether Mrs. Avina was singled out for investigation, this testimony is dispositive.

The workers' compensation judge assumed that Dalgety genuinely believed that Mrs. Avina was a danger

to the work place. However, he held this belief to be irrelevant to the § 132a action and went on to frame two threshold issues, each in accord with *Western Electric Company, supra.* First, he considered whether Mrs. Avina had demonstrated whether she could return to work without risk of re-injury. Upon deciding that she had so demonstrated, the judge considered whether Dalgety had rebutted the inference, drawn as in *Western Electric,* that its discharge of Mrs. Avina was discriminatory. The judge concluded that Dalgety had not rebutted that presumption.

The WCAB, in its final decision in favor of Mrs. Avina, reinstated the workers' compensation judge's decision, thereby adopting his issue formulation.

The Court of Appeal likewise assumed that Dalgety believed in good faith that Mrs. Avina was a danger to the work place. The court framed the threshold issue as whether that good faith belief should have been given "credence" by the WCAB. After application of the two-part test of *Western Electric,* considered above, the court concluded that Dalgety's good faith belief was unsupportable.

While, as discussed above, the various tribunals have differed in the framing of the threshold issue, none has adopted Dalgety's contention that the "arbitrary or capricious" issue should be considered in the § 132a action. This court has stated in *Montana v. U. S.,* 440 U. S. 147, 153:

> Under collateral estoppel, once an issue is actually and *necessarily* determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action in-

volving a party to the prior litigation. (Emphasis added.)

The issue of whether Mrs. Avina was in fact a danger to the work place was not necessary to the arbitrator's mission. No tribunal has adopted Dalgety's contention that any decisions the arbitrator may have made on issues not properly before him should be dispositive of issues presented in a workers' compensation action. The contention is without merit.

IV.

California's Overriding State Interest In Protecting Injured Workers Against Discrimination Is An Exception To The General Rule Of Preemption.

Dalgety contends that the liability imposed on it by application of Section 132a violates federal law in two respects: First, because granting Mrs. Avina relief under Section 132a "nullifies the results of collective bargaining;" and second, because Mrs. Avina's claim is pre-empted by the jurisdiction of the National Labor Relations Act since Dalgety's conduct is "arguably prohibited or protected" by the Act. Both contentions are without merit.

A. The Results Of Collective Bargaining Are Not Nullified Since The Protection Of § 132a May Not Be Bargained Away.

Dalgety contends that Section 132a has given Mrs. Avina "that which was bid for, but lost, in the collective bargaining process."

The California Supreme Court has said that the protection against discrimination afforded to an individual

worker by Section 132a is not one susceptible of "loss" or "waiver" through the collective bargaining process. *Judson Steel Corp., supra,* at 655, fn. 5.

The arbitrator's decision that Dalgety did not breach its contractual duty to Mrs. Avina does not absolve it from a breach of the duty imposed on all employers by Section 132a. This limitation imposed on the solutions reached by private parties to collective bargaining agreements is justified by the state's compelling interest in protecting its industrially injured workers against discrimination.

Moreover, the split of authority on this issue to which Dalgety points is illusory. The Tenth Circuit in *Peabody Galion, supra,* and the Oregon Supreme Court in *Vaughn, supra,* concluded that state workers' compensation statutes similar to Section 132a are not preempted by federal labor law. Dalgety cites the Hawaii Supreme Court's decision in *Gouveia v. Napili-Kai, Ltd.,* 649 P.2d 1119 (1982) and the Texas Court of Civil Appeals' decision in *Thompson v. Monsanto Co.,* 559 S.W.2d 873 (1977) as evidence of a conflict.

In *Gouveia,* a worker initiated an unfair labor practice charge under the NLRA for wrongful discharge. The claim was settled under the aegis of the NLRB and the worker was "made whole." When this same worker brought a state action for intentional infliction of emotional distress based on the discharge, the Hawaii Supreme Court dismissed the complaint on the ground of federal preemption. After reviewing the exceptions to the general rule of preemption, the court concluded that Gouveia had not pleaded facts sufficient to create an overriding state interest in protecting him. Notably, the court granted Gouveia leave to amend his pleading upon remand.

The Texas court in *Thompson, supra,* concluded that its state statute forbidding an employer to discriminate against an employee who pursues a workers' compensation remedy is preempted by federal law. The approach of the Texas courts as revealed in *Thompson* and thereafter in *Spainhouer v. Western Electric Company, Inc.*, 615 S. W. 2d 190 (1981), is to allow the statutory remedy only to an employee who bypasses entirely or stops short of exhausting a contractual grievance and arbitration procedure.

The short answer to the contention that the Texas decision represents a "conflict" is that each state must evaluate its own legislation and interests in light of important national labor policies. The fact that its workers' compensation scheme might not represent an overriding state interest to Texas does not make California's interest any less compelling. There is ample authority based on this Court's past applications of the doctrine of preemption to support the judgment of the California Court of Appeal.

B. § 132a Is Not Preempted By The NRLA Since It Represents A State Interest "Deeply Rooted In Local Feeling And Responsibility".

Dalgety asserts that a state statute which attempts to regulate conduct "arguably prohibited or protected" by the National Labor Relations Act is preempted by federal law. This statement is not supported by the history of judicial applications of the preemption doctrine which reveals an avoidance of any inflexible or mechanical application of the doctrine. The Tenth Circuit in *Peabody Galion, supra,* stated it this way:

> . . . the preemption doctrine is not turned on by simply shouting preemption or by pressing a button.

Id. at 1341.

1. General Rule of Preemption and Its Exceptions.

The general rule of preemption was set forth by the United States Supreme Court in *San Diego Building Trades v. Garmon,* 359 U.S. 236 (1959). The *Garmon* court recognized that there had been and would be exceptions to its general rule in appropriate classes of cases, and the courts have accordingly refused to apply the preemption doctrine to activity that might otherwise fall within the scope of *Garmon*—that is, activity arguably subject to Section 7 or Section 8 of the NLRB if that activity "was a merely peripheral concern of the LMRA. . . . or touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the states of the power to act". Id., at 243-244. E.g., *Linn v. Plant Guard Workers,* 383 U.S. 53 (1966) (malicious libel action not preempted); *Farmer v. Carpenters,* 430 U.S. 290 (1977) (intentional infliction of emotional distress action not preempted); *Sears, Roebuck and Co. v. San Diego County District Council of Carpenters,* 436 U.S. 180 (1978) (state trespass statute not preempted).

Similarly, preemption does not apply "where the particular rule of law sought to be invoked before another tribunal is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes". *Motor Coach Employees v. Lockridge,* 403 U.S. 274 (1971).

In the *Farmer* case, this Court held that a union member who alleged his union had engaged in a campaign of personal abuse and harassment against him, could main-

tain an action for damages for the intentional infliction of emotional distress. One aspect of the alleged harassment was discrimination by the union in hiring hall referrals. Although such discrimination was arguably prohibited by Sections 8(b) (1) (A) and 8(b) (2) of the NLRA and thus an unfair labor practice, this Court permitted the state cause of action to proceed despite the risk that it would touch on an area of primary federal concern and interfere with the federal scheme of regulation. This Court identified two principal factors which warranted its departure from the general rule of preemption: (i) the substantial state interest in protecting its citizens from the challenged conduct; and (ii) a finding that the exercise of state jurisdiction over the tort claim entailed insufficient potential for interference with the regulatory jurisdiction of the NLRB to counterbalance the legitimate and substantial interest of the state. The *Farmer* court cited with approval its statement in *Vaca v. Sipes,* 386 U. S. 171 at 180 (1967) that the "decision to preempt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interest being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies."

The *Linn* case, *supra,* further illustrates this point. A management employee sued a union for defamation based on statements made during an organizational campaign. If unfair labor practice charges had been filed, the Board might have found that the union violated Section 8 of the NLRA. Under a formalistic application of the *Garmon* rule, the defamation action could have been preempted. However, a number of factors influenced this

Court to depart from the general rule. First, the Court noted that the underlying conduct, that is, the intentional circulation of defamatory material known to be false, was not protected under the NLRA and there was thus no risk that the state would regulate conduct which Congress intended to protect. Second, the Court recognized that there was "an overriding state interest" in protecting its residents from malicious libels and that this interest was "deeply rooted in local feeling and responsibility" such that it fit within the exceptions specifically noted in *Garmon*. Third, the Court reasoned that there was little risk that the state cause of action would interfere with the effective administration of national labor policy as the exercise of state jurisdiction would be a "merely peripheral concern of the LMRA."

2. Section 132a Represents An Overriding State Interest.

As more fully argued above, the State of California has expressed its substantial interest in the welfare of workers who suffer industrial injuries by enacting a comprehensive workers' compensation scheme. Application of the *Garmon-Farmer-Linn* analyses does not require invalidating a vital aspect of this scheme. Section 132a reflects a state interest properly characterized as "deeply rooted in local feeling and responsibility" and fits within the express exceptions carved out by *Garmon*. Even if Dalgety is correct in contending that its conduct is "arguably prohibited or protected" under the NLRA (a contention that will be addressed below), the potential for interference with the regulatory jurisdiction of the NLRB is insufficient to counterbalance this legitimate and substantial state interest. It should be noted that the federal

judiciary scheme itself recognizes the states' overriding interest and expertise in their workers' compensation laws by prohibiting the removal of suits from state courts which are based on these laws even when there is diversity between the parties. See 28 U. S. C. 1445(c).

3. Tenth Circuit Agrees.

In *Peabody Galion, supra,* the Tenth Circuit rejected the contention that an Oklahoma statute giving a worker a cause of action if discharged for filing a workers' compensation claim is preempted by federal labor law. The court said the statute is in its nature remote from the NLRA and the collective bargaining agreement and in no way conflicts with them. After reviewing the cases in which this Court addressed the preemption question, the Tenth Circuit concluded:

> . . . the interests militating in favor of giving effect to the state law and holding that it is not an area of preemption are great. Workmen's compensation is preeminently a matter of state concern.

Id. at 1317.

4. Oregon Supreme Court Agrees.

It is an unlawful employment practice under an Oregon state statute to discriminate against an injured worker who applies for compensation benefits. The Oregon Supreme Court in *Vaughn, supra,* concluded that this statute is not preempted by federal law:

> The prevention of employment discrimination against workers receiving a state-administered compensation award is a matter of particular state responsibility and concern . . . the state has a substantial interest

in protecting the integrity of its workers' compensation system.

Id. at 287.

5. No Authority That Dalgety's Conduct Is "Arguably Prohibited Or Protected."

A finding that conduct is "arguably prohibited or protected" does not result in automatic preemption but rather is the predicate for a balanced inquiry as to the nature of the federal and state interests involved. If this necessary predicate is not established, there is no need to undertake such a balanced inquiry. If Dalgety's conduct is not emcompassed by the NLRA, there is no basis for a preemption argument.

Dalgety asserts that the NLRB has "suggested" in a "spate of recent decisions" (three) that its conduct is encompassed by the Act. The NLRB does not hold in the cases cited by Dalgety that the discharge of an employee for exercising his rights under workers' compensation laws is prohibited or protected by the NLRA. In fact, in *Grumman Flexible Corp.*, 264 N.L.R.B. No. 34 (9/28/82) the Board prefaced its finding that an employer had fired a probationary employee for a poor attendance record rather than from a desire to limit its workers' compensation liability by "assuming, *arguendo,* that the (employee's) request for workmans' compensation papers was 'protected activity'." See Appellant's Appendix HH at 464.

Dalgety cites no authority for its contention that employer conduct which violates Section 132a is "arguably prohibited or protected" by the NLRA. The Fourth Circuit in *Krispy Kreme Doughnut Corp. v. NLRB,* 635 F.2d 304 (1980) denied enforcement of a cease and desist

order requiring an employer to reinstate an employee with backpay. The court held that the discharge of an individual employee for filing a workmen's compensation claim did not violate Section 8(a) (1) of the NLRA since no protected "concerted" activity was involved. The court emphasized that such a finding is an essential predicate for the NLRB to take jurisdiction. Dalgety cites no NLRB decision during its 48-year history which declares the type of employer conduct challenged by Mrs. Avina to be an unfair labor practice under the Act and, of necessity without such a decision, cites no Appellate Court authority sustaining the NLRB's assertion of jurisdiction as within its statutory mandate.

6. No Genuine Conflict.

There is no genuine conflict among tribunals on this issue. The Fourth Circuit finds conduct similar to that of Dalgety's not to be "arguably prohibited or protected" by the NLRA. The Tenth Circuit, the Oregon Supreme Court, and the California Court of Appeal all agree that the doctrine of federal preemption does not invalidate a state workers' compensation statute such as Section 132a.

V.

The California Supreme Court Afforded Dalgety Full Opportunity To Respond To Mrs. Avina's Petition For Hearing; Dalgety's Due Process Argument Is Without Merit.

Mrs. Avina's Petition for Hearing to the California Supreme Court is dated December 2, 1981. Appellant's Appendix MM. Dalgety maintains that it received notice

of this petition only on December 18, 1981, and, as of the filing of its Petition for Rehearing on December 29, 1981, had not yet been served with a copy of Mrs. Avina's petition. The California Supreme Court granted Mrs. Avina's petition on December 23, 1981.

In her "Response to Petition for Rehearing", counsel for Mrs. Avina stated that Dalgety had been served the copy of the petition at the time it was filed, again upon the request of Dalgety's counsel on December 18, 1981, and a third time on January 3, 1982. Appellant's Appendix OO. Dalgety's failure to make a timely response to Mrs. Avina's petition was clearly due to its own oversight and not due to any refusal by the California Supreme Court to permit opposition to Mrs. Avina's petition. There was therefore no violation of Dalgety's due process rights.

Even assuming, *arguendo,* that Dalgety had not been timely served with Mrs. Avina's petition, Dalgety was not deprived of due process rights. Section 132a, collateral estoppel, and federal preemption arguments had previously been presented to the workers' compensation judge, the WCAB, and the Court of Appeal. After the Supreme Court directed the Court of Appeal to grant Mrs. Avina's petition for writ of review, Dalgety's arguments were again presented chronologically to the Court of Appeal, the California Supreme Court, the WCAB, the Court of Appeal again, and the California Supreme Court again. Dalgety's contention that the California courts "simply refused" to consider these arguments is a blatant misrepresentation. As noted above, the Court of Appeal issued a written opinion discussing Section 132a issues and modified that written opinion to include an express rejection

of the collateral estoppel and federal preemption arguments.

Dalgety asks this Court to accept review of its due process claim as if it were presented in a petition for certiorari. Mrs. Avina urges that this Court's discretion be exercised in favor of denying Dalgety's petition as no genuine and substantial question of constitutional law is presented.

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VI.

CONCLUSION

The judgment of the California Court of Appeal conforms with this Court's decisions denying preclusive effect to arbitration when a statute embodying minimum substantive guarantees and important policy considerations offers a remedy to an individual worker. It likewise conforms with this Court's decisions carving out exceptions to the doctrine of federal preemption when overriding state interests are implicated.

The conflicts alluded to by Dalgety are illusory and no substantial federal questions are presented by its appeal. Dalgety, whose arguments have twice been presented to the California Court of Appeal and Supreme Court, has not been denied due process or an opportunity to be heard.

Mrs. Avina respectfully moves this court to dismiss the appeal or, in the alternative, to affirm the judgment of the California Court of Appeal, and further moves

this Court to deny Dalgety's petition for a writ of certiorari on its due process claim.

Dated: July 22, 1983.

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